IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MWAMBEGELE, J.A., KITUSI, J.A. And KAIRO, J.A.)

CRIMINAL APPEAL NO. 74 OF 2019

BAKARI AHMAD @ NAKAMO.....1ST APPELLANT

ABDALLAH MOHAMED @ DULLA.....2ND APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)
(Matogolo,J.)

dated the 8th day of March, 2019
in
Criminal Session Case No. 82 of 2013

.....

JUDGMENT OF THE COURT

14th July, 2021 & 4th March, 2022

KAIRO, J.A.:

The appellants were charged with the offence of murder contrary to Section 196 of the Penal Code, Cap 16 R.E. 2002 (now 2019). The prosecution alleged that, on 6th November, 2012 at around 8.30 pm. at Lamada Hotel Kawawa Road area within Ilala District in Dar es Salaam City, the appellants did murder one Cosmas Ndaiga. They all pleaded not guilty to the charge. After a full trial, they were both convicted and sentenced to suffer death by hanging. Aggrieved, they appealed to the Court to challenge the conviction and the sentence meted on them.

The appellants filed three sets of memoranda of appeal; the 1st set filed on 30th April, 2020 consisting of sixteen (16) grounds of appeal; the

2nd set filed on 18th June, 2020 consisting of eight (8) grounds of appeal and the 3rd set filed on 25th April, 2021 comprising of two (2) grounds of appeal. We shall herein refer to them as the 1st, 2nd and 3rd sets of memoranda. We wish to point out from the beginning that most of the raised grounds are repetitive, and thus we find it imperative to cluster them into grounds of complaints which shall form the basis of our determination in this appeal. We shall revert to this matter later.

Briefly, the prosecution case stated that; the deceased and the appellants were friends. On the material date and time, the appellants allegedly shot the deceased on his head. It was averred that before the said incident there was misunderstanding between the deceased and the appellants. The quarrel was on some money the trio got from robbery activities they together committed, but swindled by the deceased. After shooting him, they escaped by a motorcycle leaving behind the deceased seriously injured. The gun shot was heard by one Hamad Mohamed Ally, (PW6) who was coming from the mosque among other persons. He went to the scene and found a shot person lying down bleeding and there was a motorcycle beside him. According to PW6, the victim appeared lifeless. Later, the police came and recorded his statement.

The police officers; Tupendane Saguda Kilengwa (PW1) and D/CPL Bakari (PW4) were among those who went to the scene of crime. They

found the victim bleeding profusely, but still alive. The victim told PW1 that his name was Cosmas Ndaiga and gave a story of what happened. PW1 recorded the victim's statement in which he mentioned the appellants to be his assailants. The victim then affixed his thumb on the said statement and PW1 certified it accordingly. On further inspection at the scene of crime, PW4 testified to have found a cartridge of a shotgun which during the trial was admitted as exhibit P7. The victim was then taken to Muhimbili Hospital for treatment, but succumbed to death on 8th November, 2012. His statement was later admitted at the trial as exhibit P3. A sketch map of the scene of incidence was admitted during the Preliminary Hearing (PH) as exhibit P2.

On 9th November, 2012 around 8.00 pm while on duty, one Sgt. Lugano who testified as PW3 was ordered to make a follow-up on some suspects at Tandika area, Temeke District within Dar es Salaam City. He was accompanied by Sgt. Frederick and went on a motorcycle. They spotted two persons riding a motorcycle and suspected them. PW3 and his fellow pushed the suspected persons' motorcycle. They fell down and they apprehended them.

It was PW3's testimony that the persons happened to be the appellants and one of them had a bag. Inside the bag, they found a gun with serial No. 12/76/T.5870 and three live ammunitions of a short gun.

They seized them. During trial, the gun was admitted as exhibit P6. The appellants were later taken to Msimbazi Police Station where they recorded their statements on 10th November, 2012 around 8.30 am. PW1 recorded the cautioned statement of the 1st appellant and PW2 recorded the cautioned statement of 2nd appellant. Both statements were admitted as exhibits P4 and P5, respectively.

According to PW1, the 1st appellant admitted in his cautioned statement that he was the one who shot the deceased. It was also the testimony of PW2 that the 2nd appellant had as well confessed to have participated in the killing of the deceased. The shotgun and the cartridge were taken to the armoury for safe custody by PW4. He later together with PW1 sent the said shotgun, cartridge and the rounds of ammunitions of the shotgun to the ballistic expert for the purpose of determining their physical and mechanical working condition and further determine if the used cartridge of a shotgun was fired from the seized gun. The investigation was conducted by one Insp Gilbert Lukaka (PW5). The witness later wrote the Ballistic Expert report which was admitted as exhibit P8 and further tendered the three rounds of ammunition which were admitted collectively as exhibit P9. In the findings, PW5 stated that the one spent cartridge (exhibit P7) of a shotgun was fired from the seized shotgun (exhibit. P6) with serial No. 12/76/T.5870.

In their defence, both appellants denied the charge. They further denied to know each other and both of them denied to know the deceased.

After a full trial, the court found both appellants guilty of the offence as charged. The appellants were thus convicted and sentenced to the mandatory sentence of death by hanging.

The High Court hinged its decision on the dying declaration of the deceased (exhibit P3) in which the appellants were named to be the assailants. The trial court further found that, the said dying declaration was corroborated by the cautioned statements of both appellants (exhibits P4 and P5). Besides, it was further corroborated by the evidence of PW4 and PW5 who were found to be credible and reliable witnesses.

Aggrieved, both appellants have appealed to the Court with (3) three sets of memoranda as intimated earlier with a total of 26 grounds which raise four grounds of complaints: **One,** that the trial was conducted without the effective aid of assessors which is in relation to the 13th ground in the first set of the memorandum and the 1st ground in the third set of the memorandum; **Two,** that exhibits P3, P4 and P5 were recorded in contravention of the law and admitted in court as evidence against the laid down procedure. The complaint is in relation to the 1st, 2nd, 3rd, 10th and 11th grounds in the first set of the memorandum together with the 1st up to

5th and the 7th grounds in the second set of the memorandum; **three,** that exhibits P6, P7, P8 and P9 were improperly procured and admitted in court as evidence which is in relation to the 5th up to 8th in the first set of the memoranda and the 8th ground in the second set of memorandum; and **four,** that the prosecution did not prove the case beyond reasonable doubts which is in relation to the 12th up to 16th grounds in the first set of the memorandum together with the 6th and 7th of the second set of the memorandum.

When the appeal was placed before us for hearing, both appellants were represented by Mr. Nehemia Nkoko, learned counsel and the respondent Republic had the services of Misses. Haika Temu and Sabina Ndunguru, both learned State Attorneys.

Upon taking the floor to expound on the grounds of appeal, Mr. Nkoko sought leave to adopt the three sets of the appellants' memoranda and the written submission in support of the same.

The main issue with regards to the first ground of complaint is centered on the assessors whereby the laid down procedures concerning them is claimed to have been flawed during trial.

In elaboration, Mr. Nkoko listed the following claimed shortcomings: **One,** the trial Judge did not record the age of the assessors selected;

two, their duties were not explained to them; **three,** the assessors were not properly directed on vital points of law during summing up giving the examples on circumstantial evidence, repudiated cautioned statements and their applicability. Instead, the Judge simply mentioned the said points. **Four,** the trial Judge did not assign any reasons to disagree with the unanimous opinion of the assessors.

Mr. Nkoko went on to argue that, the pointed-out flaws are fatal and vitiate the proceedings. He cited the case of **Peter Charles Makupila @ Askofu vs. Republic**, Criminal Appeal No. 21 of 2019 (unreported) to back up his argument. According to him, the said flaws raise doubts which legally have to benefit the appellants. He invited the Court to take the similar stance taken in the cited case of **Peter Chares Makupila** (supra) and nullify the whole proceedings of the trial court, set aside the conviction and sentence. He however pleaded with the Court not to order a retrial as the order shall afford the prosecution a chance to fill in the observed gaps. Instead, the appellants be set free.

Ms. Temu in her response readily conceded to the pointed-out flaws. Further, she did not dispute that the shortcomings have the effect of vitiating the proceedings but urged the Court to order a retrial and not release of the appellants. She contended that the evidence on record is sufficient to convict them.

In the rejoinder, Mr. Nkoko repeated his submission in chief insisting his prayer to set free the appellants.

For ease of reference, we found it apposite to reproduce the complained part of the record as follows:-

> ***"Ms. Faraja George – State Attorney:***
>
> *My lord, the case is for hearing. We have two witnesses who are ready to testify.*
>
> ***Court:-***
>
> *Assessors are selected namely:*
>
> *1. Fidea Mhando*
> *2. Husna Nando*
> *3. Janet Lema.*
>
> *Accused persons are asked if they have objection to any of them.*
>
> *1st Accused: I have no objection to assessors.*
>
> *2nd Accused: I have no objection to assessors.*
>
> ***Sgd: F.N. Matogolo***
>
> ***Judge***
>
> ***08/11/2017***
>
> ***Court:***
>
> *Charge read over and explained to the accused persons who are required to plead thereto.*
>
> ***Plea:***
>
> *1st accused- "Si kweli".*
>
> *2nd accused- "Si kweli".*
>
> *Entered plea of not guilty to the charge.*

Sgd: F.N. Matogolo

Judge

08/11/2017

Ms. Faraja George – State Attorney:

My lord, we are ready to proceed with our witnesses.

PROSECUTION CASE OPENS...".

According to the quoted part of the record, it is not in dispute that the ages of the assessors were not indicated. It is equally not in dispute that the trial court did not explain to the selected assessors their roles and responsibilities in the trial and what the court expects from them in the conduct of the hearing and at the conclusion of the evidence. We have instructively restated in our various decision the said mandatory requirement including the case of **Hilda Innocent vs. Republic**, Criminal Appeal No. 181 of 2017 and **Abdallah Juma @ Bupale vs. Republic** Criminal Appeal No. 537 of 2017 (both unreported) to mention but a few. In **Hilda Innocent vs. Republic**, (supra) we reproduced what we stated in Laurent **Salu Laurent Salu & 5 others vs. Republic,** Criminal Appeal No. 176 of 1993 (unreported) as follows:

> *"Admittedly the requirement to give the accused the opportunity to say whether or not to object to any of the assessors is not a rule of law. It is a rule of practice which, however, is now well established and*

accepted as part of the procedure in the proper administration of criminal justice in the country ... the rule is designed to ensure that the accused person has a fair trial and to make the accused person have confidence that he is having a fair triai, it is of vital importance that he be informed of the existence of this right. The duty to inform him is on the trial judge, but if the judge overlooks this, counsel who are officers of this Court have equally a duty to remind him of it".

That apart, the record is further clear that the trial Judge did not direct assessors on the vital points of law that emerged in the case at hand when summing up to them. We have noted that points of law relating to dying declaration, repudiated confessions, circumstantial evidence, corroboration, and credibility of witnesses were not explained to the assessors nor their applicability. Yet, these are points of law that formed the basis of the trial Judge's decision. It is a settled legal procedure that such points are supposed to be well explained to assessors as well as their applicability during summing up so as to get their objective opinions at the end of the trial. We thus wholly agree with both learned counsel's observation that the trial Judge did not perform the said obligation in this case. We however noted that, the trial Judge stated, though very briefly, the reason to differ with the unanimous opinion of the assessors. We thus do not agree with Mr. Nkoko's submission on this aspect. Nevertheless, as

stated above, we subscribe to the rest of the pointed-out shortcomings with regard to assessors. We further agree with the invitation to nullify the proceedings as a consequence. However, the two counsel part ways on the way forward after the nullification of the proceedings. The rival arguments are centered on whether or not a retrial should be ordered.

In determining the same, the principle stated in **Fatehali Manji vs. Republic** [1966] IEA 343 shall be a guidance. It states:-

> *"In general, a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered;* ***each case must depend on its own facts and circumstances and an order for retrial should only be made where the interests of justice require it".*** [emphasis supplied]

Applying the above stated principle to the facts at hand, we are of firm view that ordering a re-trial in the circumstances is tantamount to affording the prosecution a chance to fill in the gaps which route we decline to take for the interest of justice. We are of the stated view due to

other shortcomings including procedural ones observed in the second and third grounds of complaint as we shall demonstrate shortly herein.

The contentious issue with regard to the second ground of complaint is based exhibits P3, P4 and P5. Starting with exhibit PW3, which is a dying declaration; the complaint is that the trial court erred in relying on it in spite of being tendered against the procedure. Mr. Nkoko elaborated that, exhibit P3 was admitted as evidence contrary to sections 34B (2) (c) (d) and (e) of the Law of Evidence Act, cap 6 RE 2019 which require a party intending to tender it to give a notice to the adverse party within 10 days prior to the tendering date and further avail a copy of the statement to the adverse party to enable him to know the substance of the evidence contained therein.

Mr. Nkoko also submitted that the contents of exhibit P3 were not read over to the appellants after its admission in court. According to him, the omission is fatal and the exhibit should have been expunged from the record as a consequence. He cited the case of **Zheng Zhi Chao vs The Director of Public Prosecution**, Criminal Appeal No. 506 of 2019 (unreported) to back-up his argument.

In reply, Ms. Temu readily conceded that the contents of exhibit P3 were not read over in court after being admitted. She further conceded to the submission that it should be expunged from the record as a remedy.

Indeed, the record is clear that exhibit P3's contents were not read over to the appellants as required. The reason behind the said requirement is to let the accused to know and understand the contents of the same. The law is settled that, failure to read out the contents of an exhibit after its admission in evidence is an incurable irregularity as it violates the accused's right to a fair trial (the appellants in the case at hand). See **Robinson Mwanjisi and 3 others vs. Republic** [2003] T.L.R. 218, **Nkalozi Sawa and Chona Sebeya vs. Republic,** Criminal Appeal No. 574 of 2016 (unreported) and **Zheng Zhi Chao** (supra). In **Robinson Mwanjisi** (Supra) the Court stated among other things: -

> *"whenever it is intended to introduce any document in evidence, it should first be cleared for admission and be actually admitted, before it can be read out..."*

As rightly submitted by both learned counsel, the effect of such an irregularity is to expunge the respective document from the record as we accordingly, hereby do. We are mindful that there are other infractions pointed out regarding exhibit P3, but we do not see the need to address them, now that the document is no longer part of the record.

As for exhibits P4 and P5 (retracted cautioned statements of the 1st and 2nd appellants respectively), Mr. Nkoko's contention is to the effect that, the trial court erred to rely on exhibits P4 and P5 to convict the

appellants. He elaborated that, both exhibits were recorded beyond the four hours stipulated by law, thus, contravening sections 50 (1) and 51 (1) of the Criminal Procedure Act, Cap 20 R.E. 2002 (now 2019) (the CPA). Further to that, PW1 and PW2 recorded the appellant's statement at the presence of other police officers in the same room which he argued to be an irregularity that infringed the appellants' right to privacy. He cited the case of **Kisonga Ahmad Issa and Another vs. Republic**, Consolidated Criminal Appeals No. 171 of 2016 and Criminal Appeal No. 362 of 2017 (unreported). Adding another flaw in respect of exhibit P4, Mr. Nkoko argued that the document was wrongly admitted because PW1 who recorded it was categorical in his testimony that he did not inform the 1st appellant on his rights before recording his statement. Besides, no trial within a trial was conducted by the trial court to determine the 1st appellant's voluntariness in giving the said statement before admitting it as evidence. On account of the pointed-out infractions, Mr. Nkoko beseeched the Court to expunge both exhibits P4 and P5 from the record.

Responding, Ms. Temu submitted that, the appellants were interviewed after the lapse of four hours due to circumstances pertaining to their apprehension which she argued to be allowed under section 50 (2) of the CPA. She further argued that trial within a trial was not conducted before the admission of exhibit P4 as the objection raised therein did not

concern voluntariness of PW1 when recording statement, as such the need to conduct the same did not arise. We wish to point out at this juncture that Ms. Temu did not address the other arguments raised by Mr. Nkoko.

Going through the record, it is true that, both statements were recorded beyond the four hours stipulated by law. Though Ms. Temu has argued that the circumstances surrounding the apprehension of the appellants justified the lapse, thus allowed under section 50 (2) office CPA, the said circumstances were not explained. But further, even where justified reasons exist, an extension of time was supposed to be applied under section 51 (a) and (b) of the CPA. In the absence of the said application, we are constrained to reject the argument of Ms. Temu, with much respect.

Our further scrutiny of the record of appeal, we observed that indeed PW1 and PW2 who recorded the statements of the 1st and 2nd appellant did so while other police officers were also present in the same room. (pages 46 and 64 lines 18-19 and 4-5 respectively). It is our firm conviction that, the action of recording the appellants' statements in the presence of other police officers has prejudiced the appellants in two ways: **First**; it cannot be ruled out that the appellants were not free agents when recording their statements. **Secondly**; the appellants' right to privacy was infringed. The effect of both shortcomings is to have the respective statement expunged

from the record. We have given the said stance in our various previous decisions including **Kisonga Ahmad Issa and Another** (supra) cited to us by Mr. Nkoko wherein we heid:-

> *"It is further noted that the cautioned statement of the 1st appellant was recorded by PW1 in the presence of the other police officers. That was yet another irregularity, as the right of privacy to the 1st appellant was infringed. We therefore, find merit on this ground of appeal and expunge all confessional statements from the record".*

In the same vein, we hereby expunge exhibits P4 and P5 from the record of appeal. We understand that there are other flaws pointed out with regard to these exhibits, but having expunged them, we do not see the need to discuss them.

Regarding the third ground of complaint, the issue hinges on improper procurement and admission of exhibits P6, P7, P8 and P9, which the appellant argued to have also formed the basis of the appellants' conviction. In elaboration, Mr. Nkoko started with exhibit P6 (the gun) and P7 (the used cartridge of a shotgun) which he argued that the same were not among the items in the list of the prosecution exhibits given during the committal proceedings. He referred us to pages 23 – 24 of the record of appeal where prosecution exhibits were listed. Besides, no notice was

given by the prosecution to the defence side showing his intention to introduce and tender them, which he argued to be against the procedure.

Turning to exhibits P8 and P9 (Ballistic Expert Report and three (3) rounds of ammunition), Mr. Nkoko complained that the same were tendered by PW5 who was not listed in the list of prosecution witnesses as required under the provision of section 247 of the CPA, thus PW5 was incompetent witness to testify. He added that exhibit P8 was incomplete for lacking a book of photographs which was stated to be combined therein. Further to that, he argued that the chain of custody in respect of exhibits P6, P7 and P9 was not established so as to prove that the items tendered in court were the very ones alleged to have been seized, stored, handled and finally tendered in court. He argued that the omission was contrary to the requirement stipulated under the Police General Order (PGO) 229 which insists on proper and secure handling of physical exhibits from seizure to the tendering time. He questioned the said process in the case at hand arguing that it raises doubts on the genuineness of the same, which doubts are to be resolved in favor of the appellants. To back up his argument regarding the chain of custody Mr. Nkoko refered us to the case of **Hemed Athumani Silaju vs. Republic;** Criminal Appeal No. 120 of 2006 (unreported). To wind up his argument on the ground, Mr. Nkoko urged the Court to find the ground with merit and allow the appeal.

Responding to the argument on the tendering of the exhibits P8 and P9, Ms. Temu did not dispute that PW5 was not listed in the name list of the prosecution witnesses given during the committal proceedings. She however stated that the report contained in exhibit P8 was mentioned during the PH and the substance of his evidence was read over. She referred us to page 34 of the record of appeal for verification and argued that, no failure of justice was occasioned to the appellants. No further responses were given with regard to other arguments by Mr. Nkoko.

Our perusal of the record of appeal particularly page 24 confirms that exhibit P6, P7 and P9 are not in the list of the prosecution exhibits to be tendered at the trial. Worse still, as rightly submitted by Mr. Nkoko, they were neither listed during the PH stage of the case. The rationale of listing them during the committal and/or the PH stage is to safeguard and guarantee an accused person facing the charge, a fair trial by affording the accused with an opportunity to know and understand the prosecution case in advance and thus be able to make a meaningful defence. We have given a similar stance in **Masomba Musiba @ Musiba Masai Masomba vs. Republic**, Criminal Appeal No. 138 of 2019 (unreported). In the case at hand, the exhibits were introduced during the trial to which in our candid view, was prejudicial to the appellants as no fair hearing was guaranteed in the circumstances. On that account, the said exhibits are bound to

suffer expunge as well. We accordingly therefore expunge exhibits P6, P7 and P9 from the record.

The record further reveals that PW5 was not listed as among the witnesses who would testify in the case. Neither did we find any application by the prosecution being made under section 289 (1) of the CPA praying to add him as an additional witness. Basing on the said observation, we are satisfied that PW5 gave his evidence without featuring in neither the committal proceedings nor PH hearing. We are mindful that Ms. Temu has argued that the ballistic expert report was mentioned and read over during the PH stage, but the issue is not the report itself, rather, PW5 who is alleged to be the maker of the report. It would have been different if the list would have indicated that there would be a "ballistic expert" without mentioning his name. But in the present situation, there is no clue whatsoever that there would be such an expert to testify. Nevertheless, the prosecution would have still applied to include PW5 as an additional witness under section 289 (1) of the CPA if wished to summon him to testify. Ms. Temu's argument on the issue is therefore holds no water with due respect. When faced with an akin situation under scrutiny in **Hamisi Meure vs. Republic** [1993] TLR 213 quoted in **Michael Msigwa vs. Republic,** Criminal Appeal No. 216 of 2019 (unreported), the

Court rejected the evidence of the witness who did not feature in the committal proceedings and observed as follows:-

> *"It having been accepted by the prosecution and the Judge himself that PW2 did not feature in the record of committal proceedings, he should not have been allowed to give evidence in contravention of the provision of section 289 which are mandatory".*

Flowing from the quoted observation, we hold that the evidence of PW5 was improperly received by the trial court and thus illegally acted upon. We are thus bound to expunge it from the record. Mindful of the fact that it was PW5 who tendered exhibit P8, it goes that the exhibit has no legs to stand on. It has to suffer the same consequences of being expunged and we accordingly do the needful by expunging it.

Basing on the above findings, we agree with both learned counsel that the trial was conducted without the effective aid of the assessors, as such the complaint is meritorious and we allow it. We therefore nullify the proceedings and the judgment of the trial court, quash conviction and set aside the sentence of death that was imposed on both appellants. However, having observed that exhibits P3, P4 and P5 were recorded in contravention of the law but admitted in court as evidence against the laid down procedure, and further that exhibits P6, P7, P8 and P9 were improperly procured and admitted in court as evidence, we find that a

retrial will not be appropriated in the circumstances. In the end, we order the immediate release of Bakari Ahmed @ Nakamo and Abdallah Mohamed @ Dula from custody unless otherwise held for other lawful causes.

Appeal allowed.

DATED at **DAR ES SALAAM** this day of 1st March, 2022.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

The Judgment delivered this 4th day of March, 2022 in the presence of appellants, represented by Nihemia Nkoko and Ms. Jackline Werema, learned State Attorney for the respondent/Republic is hereby certified as a true copy of the original.

D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL